Following a non-work injury, a temporary help firm employee requested work that accommodated her 10 lb. lifting restriction, but the employer did not offer any. This communication satisfied the temporary help firm employee requirement under G.L. c. 151A, § 25(e). She was not required to request a different assignment or leave of absence before filing for benefits.

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Issue ID: 0029 1423 93

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. Benefits were denied on the ground that the claimant resigned without making reasonable efforts to preserve her employment, and, therefore, she was disqualified pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on May 14, 2019. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on July 18, 2019. The claimant sought review by the Board, which remanded the case for additional evidence, but the claimant failed to attend the remand hearing. Subsequently, the Board dismissed the claimant's appeal due to the claimant's failure to show cause for missing the remand hearing. The claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On September 20, 2020, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's status as a temporary help firm employee and the circumstances surrounding her separation. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant failed to make reasonable efforts to preserve her employment, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant worked for a temporary help firm and sought a new suitable assignment from the employer before filing for benefits.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. On March 13, 2016, the claimant began working for a temporary agency. This agency assigned the claimant to work for one of its clients, as a general laborer, packaging spinach and salads. This was a full-time job which required lifting boxes weighting up to 50 pounds. The claimant continued working at this assignment until January 3, 2019. It was her only assignment.

2. The claimant was diagnosed several years ago with arthritis in her foot. This condition causes her pain in her foot when she stands for long periods. She discussed this condition with her Personal Care Physician (PCP) and was prescribed medication for the pain. However, if she takes this medication too often, it may cause kidney damage. She therefore restricts her use of the medication. The claimant did not inform the present employer of this condition, present any medication documentation to this employer regarding it, or request an accommodation for the condition.

3. The claimant did not specifically discuss her foot pain with a doctor between January 3, 2019, and March 18, 2019.

4. On or about January 3, 2019, the claimant fell outside of work and injured her elbow. She was seen at the ER on January 3, 2019, and then by a Physician's Assistant (PA) on January 4, 2019. The PA excused the claimant from work from January 3, 2019, to January 9, 2019.

5. The claimant attended occupational therapy to treat her elbow injury.

6. On January 9, 2019, the claimant saw her primary care physician (PCP). He excused her form work from January 9, 2019, through January 16, 2019, due to her elbow injury.

7. The claimant did not formally request FMLA or any other medical leave from the employer. She did inform them of her injury and inability to work for the periods outlined by her PCP. The employer allowed her to take this time off from work.

8. On January 18, 2019, the claimant saw her PCP again. He released her to work starting January 20, 2020, with the restriction that, until February 18, 2019, she lift no more than 10 pounds.

9. The claimant gave the present employer a note from her doctor releasing her to return to work, as of January 19, 2019, with the restriction of lifting no more than 10 pounds through February 18, 2019. At that time, the employer's representative told the clamant that the client did not have any light duty work to offer her but that she could return to the position with this client once her

restriction was lifted. The employer did not specifically call this a leave of absence when speaking to the claimant. They never suggested or requested that she complete and/or submit any FMLA, or other type of leave, documentation.

10. The claimant did not know the employer considered her to be on a leave of absence. She considered herself to have been discharged, since she was willing to work with restrictions, but the employer was [sic] allowing her to do so. She did understand that, as of January 19, 2019, the client she had been assigned to work for was going to allow her to return to her assignment, when and if she was again able to work without lifting restrictions.

11. The claimant and the employer never discussed the possibility of the claimant working for a different client. The claimant did not specifically ask about this and the employer did not offer or suggest it.

12. The claimant needed income to support herself and was hurt that, after working for them for 4 years they did not care enough about her wellbeing to provide a light duty position. She decided that she no longer wanted to work for this client. She did not, however, communicate this decision to the employer. The claimant would have been willing to accept a light duty assignment with a different client if it were offered to her.

13. On January 25, 2019, the claimant filed her 2019 claim for unemployment benefits effective January 20, 2019.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

In determining the claimant's entitlement to benefits, we must analyze the following provisions under G.L. c. 151A, § 25(e), which provide, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent, . . .
>
> A temporary employee of a temporary help firm shall be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment before filing for benefits and the unemployment benefits may be

> denied for failure to do so. Failure to contact the temporary help firm shall not be deemed a voluntary quitting unless the claimant has been advised of the obligation in writing to contact the firm upon completion of an assignment.

In her original decision, the review examiner focused on whether the claimant could have preserved her tenure with this employer by extending a medical leave of absence. In doing so, the review examiner did not consider that the employer is a temporary help firm. Consolidated Finding # 1 now confirms that the claimant was a temporary help firm employee.

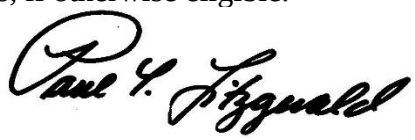
G.L. c. 151A, § 25(e), is very specific about the effort to preserve employment that is required of a temporary help firm employee after she stops working and before filing an unemployment claim. The provision requires a claimant to contact the employer for reassignment. Here, the record shows that due to a non-work-related injury, the claimant stopped working for the employer on January 3, 2019. *See* Consolidated Findings ## 1 and 4. On or about January 18, 2019, she contacted the employer with a medical note allowing her to work at a placement that required her to lift no more than 10 pounds. At this point, the employer did not offer the claimant any more work. *See* Consolidated Finding # 9.

We have previously stated that the statutory purpose underlying the requirement that a temporary employee contact her temporary employer for a reassignment prior to filing for benefits is to provide the temporary employer with actual notice of an employee's availability for reassignment and the opportunity to offer a suitable reassignment. Board of Review Decision 0002 2757 85 (Sept. 20, 2013) (where claimant communicated with the employer, but lack of transportation rendered the offered job unsuitable, claimant satisfied the requirements for employees of temporary placement services set forth in G.L. c. 151A, § 25(e)).

When the claimant in the present case contacted the employer on or about January 18, 2019, the employer did not offer her any work that accommodated her weight-lifting restriction. The only work discussed was her former placement, which was not suitable due to its demand to lift up to 50 pounds. *See* Consolidated Findings ## 1 and 9. Thus, well before the claimant applied for benefits, a communication occurred between the parties that afforded the employer with actual notice of the claimant's availability and the opportunity to provide a suitable reassignment. It was not necessary that the claimant affirmatively ask the employer for a different assignment or a leave of absence. The parties' January 18, 2019, communication effectuated the statutory purpose.

We, therefore, conclude as a matter of law that the review examiner's decision to disqualify the claimant under G.L. c. 151A, § 25(e), is not supported by substantial and credible evidence or free from error of law.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 20, 2019, and for subsequent weeks, if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - December 23, 2020

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh